

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK
AUG 28 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

UPS SUPPLY CHAIN SOLUTIONS,)	
INC., a Delaware corporation,)	
)	
Third-Party Plaintiff/)	2 CA-CV 2009-0015
Appellant,)	DEPARTMENT B
)	
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
PARTIDA BROKERAGE, INC., an)	Rule 28, Rules of Civil
Arizona corporation; DAVID PARTIDA)	Appellate Procedure
and DIANA PARTIDA, husband and)	
wife,)	
)	
Third-Party Defendants/)	
Appellees.)	
)	

APPEAL FROM THE SUPERIOR COURT OF SANTA CRUZ COUNTY

Cause No. CV-05241

Honorable Stephen M. Desens, Judge

AFFIRMED IN PART;
REVERSED IN PART AND REMANDED

Gaona Law Firm
By David F. Gaona

Phoenix
Attorneys for Third-Party
Plaintiff/Appellant

McNamara, Goldsmith & Macdonald, P.C.
By Eugene N. Goldsmith

Tucson
Attorneys for Third-Party
Defendants/Appellees

E C K E R S T R O M, Presiding Judge.

¶1 Appellant UPS Supply Chain Solutions, Inc. (“UPS”) appeals from an order dismissing its third-party complaint against appellees and third-party defendants Partida Brokerage, Inc., and David and Diana Partida (collectively, “Partida”). We reverse the trial court’s judgment in part and remand for the reasons set forth below.

Factual and Procedural Background

¶2 The original dispute in the case concerned a shipment of cigarettes owned by the plaintiff, Inter “K” N.V. (“Inter K”), a foreign corporation that is not a party to this appeal. According to its complaint, Inter K had transferred the cigarettes to UPS’s warehouse in Nogales, Arizona, pending full payment by the prospective buyer, G. Puchi Wholesale Foods Corp.; its manager, Alfred Puchi, Jr.; and his wife Magda (collectively, “Puchi”). Before Inter K had received full payment, and without authorization from Inter K, UPS released the cigarettes to Puchi at the request of Partida, which was acting on Puchi’s behalf. Inter K filed its complaint against Puchi and UPS on July 1, 2005, alleging *inter alia* that UPS had breached its duty as bailee and had negligently allowed the goods to be transported.

¶3 In February 2008, the trial court granted a motion UPS filed pursuant to Rule 14(a), Ariz. R. Civ. P., to assert a third-party complaint against Partida.¹ In that complaint, UPS alleged that Partida had engaged in intentional misrepresentation, in violation of A.R.S. § 44-1522, as well as negligent misrepresentation, and that UPS had suffered damages as a result. Although it did not assert an indemnification claim against Partida in a separate count, UPS also alleged the following:

7. UPS is informed and believes, and therefore alleges that [Partida] w[as] negligent and/or in breach of contract or in some other actual manner . . . fully responsible for the events and occurrences set forth in Inter K's complaint and proximately caused any and all damages or losses incurred by Inter K and for which Inter K seeks relief against UPS as alleged in the underlying complaint.

8. This Court has jurisdiction over UPS'[s] Third Party claim as it arises out of the transaction or occurrences that are the subject matter of Inter K's complaint, and [Partida] . . . [is] or may be liable to UPS for all or part of the claims asserted against UPS in Inter K's complaint. UPS is informed and believes that it is in no way responsible for injuries or damages alleged in Inter K's complaint[;] however, if UPS is found liable under any legal theory for any damage or injuries alleged in the complaint, then UPS is informed and believes and therefore alleges that the negligence or other actual conduct or activity of [Partida] was active, primary and affirmative and that any negligent or other actual conduct or activity on the part[] of UPS, if any, was . . . merely passive, derivative and secondary.

¹UPS also named G. Puchi Wholesale Grocery Corp. as a third-party defendant. The similarly named G. Puchi Wholesale Food Corp. was already a defendant in the original action as well as a cross-defendant on UPS's cross-claim and thus not a third-party defendant within the meaning of Rule 14(a). The trial court's later judgment did not expressly dispose of any claims against G. Puchi Wholesale Grocery Corp., and it is not a party to this appeal.

9. If UPS is liable for any part of the claims asserted against it, UPS is entitled to total indemnification from [Partida] . . . or alternatively, partial or full equitable indemnification and thus UPS can recoup from [Partida] and be reimbursed by [Partida] . . . for any sums UPS must pay to Inter K or to any other party to this matter.

UPS included similar requests for indemnification in its prayer for relief, seeking either “total indemnification for any sum adjudged against UPS” or “partial, equitable indemnification of any sum that UPS must pay . . . in excess of the proportionate share of UPS’[s] liability.”

¶4 Partida moved to dismiss UPS’s third-party claims against it on the grounds such claims were barred by the relevant statutes of limitation. Without separately identifying UPS’s claims, the trial court found they were all time barred and therefore granted the motion to dismiss. The court then entered judgment in favor of Partida pursuant to Rule 54(b), Ariz. R. Civ. P. This appeal followed.

Discussion

¶5 UPS concedes its claims of intentional and negligent misrepresentation have expired under the relevant statutes of limitation. Its sole argument on appeal is that the trial court erred in finding its separate claim for indemnity was also time barred. We review de novo a trial court’s dismissal based on a statute of limitation, *Andrews v. Eddie’s Place, Inc.*, 199 Ariz. 240, ¶ 1, 16 P.3d 801, 802 (App. 2000), and we agree with UPS that the court erred to the extent it dismissed the indemnity claim on a limitations ground.

¶6 Rule 14(a), Ariz. R. Civ. P., allows a claim against a third party based on contingent liability, *Nikolous v. Superior Court*, 157 Ariz. 256, 258, 756 P.2d 925, 927

(1988), and UPS alleged in its complaint *inter alia* that it sought indemnification “[i]f UPS is liable for any part of the claims asserted against it.” “The right [to indemnity] exists when there is a legal obligation on the indemnitee to pay or a sum is paid by him for which the indemnitor should make reimbursement.” *INA Ins. Co. v. Valley Forge Ins. Co.*, 150 Ariz. 248, 253, 722 P.2d 975, 980 (App. 1986). Accordingly, an indemnity claim accrues when liability is established or when an indemnitee actually pays a sum for which he or she has been found liable. *See id.* Because UPS had not yet been found liable or made any payment when the trial court dismissed its claims, it did not have a right to indemnification at that time. *See id.* Consequently, the trial court erred in determining that UPS’s indemnity claim had already accrued and was “barred by the . . . statute of limitations.”

¶7 Partida responds that UPS “d[id] not allege an independent cause of action for indemnity” and did not state a cognizable indemnity claim below given Arizona’s statutory abolition of joint and several liability and adoption of comparative fault. *See* A.R.S. § 12-2506(A), (B) (in action for property damage, “[e]ach defendant is liable only for the amount of damages allocated to that defendant in direct proportion to that defendant’s percentage of fault,” and factfinder must ascribe percentage of fault to anyone contributing to damages); *Herstam v. Deloitte & Touche, LLP*, 186 Ariz. 110, 118, 919 P.2d 1381, 1389 (App. 1996) (defendant who may only be held severally liable and will not be required to pay damages beyond his or her own percentage of fault has no basis for claiming indemnity from other parties). Insofar as Partida believed the indemnity claim was legally defective, it should have

filed a motion to dismiss pursuant to Rule 12(b)(6), Ariz. R. Civ. P., for failure to state a claim. *See Williams v. Williams*, 23 Ariz. App. 191, 194, 531 P.2d 924, 927 (1975) (“If a complaint does not state a claim against a defendant[,], the only motion available to the defendant is a motion to dismiss.”). However, Partida never moved to dismiss for failure to state a claim, and the trial court dismissed the indemnity claim solely on the ground it was untimely.

¶8 Generally, this court will “affirm a trial court’s ruling if it is correct for any reason.” *Wertheim v. Pima County*, 211 Ariz. 422, ¶ 10, 122 P.3d 1, 3 (App. 2005). However, dismissal for failure to state a claim should only occur after a party has had an opportunity to amend a pleading and cure its defects. *Dube v. Likins*, 216 Ariz. 406, ¶ 24, 167 P.3d 93, 102 (App. 2007). Aside from comments Partida made in reply to UPS’s answer to the motion to dismiss, nothing in the record indicates that the parties ever addressed, or that the trial court ever considered as a basis for dismissal, whether UPS adequately had pled an indemnity claim or stated a valid theory of indemnification. We decline Partida’s invitation to undertake such analyses in the first instance on appeal.

Conclusion

¶9 We do not reach the issue of whether UPS stated a valid claim for indemnity below because the trial court did not do so. However, to the extent UPS asserted an indemnity claim against Partida, the court erroneously dismissed that claim on the ground that it was barred by a statute of limitations. We therefore reverse the trial court’s judgment

in part and remand the case to the trial court for further proceedings. Because UPS did not provide the statutory or contractual grounds in its request for attorney fees on appeal, we deny that request.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

J. WILLIAM BRAMMER, JR., Judge

GARYE L. VÁSQUEZ, Judge